

8 September 2003

Chief, Marine Mammal Conservation Division,
Attn: ZMRG, Office of Protected Resources,
NMFS, 1315 East-West Highway,
Silver Spring, MD 20910.

fax: 301-713-0376

[RE: Authorization for Commercial Fisheries under the Marine
Mammal Protection Act of 1972; Zero Mortality Rate Goal 68 FR
40888]

The Whale and Dolphin Conservation Society (WDCCS) and the Cetacean Society International (CSI) welcome the opportunity to comment on the proposed definition of the Zero Mortality Rate Goal (ZMRG).

When the Marine Mammal Protection Act (MMPA) was initially drafted in 1972, it took as its mandate the concept that fishery interactions with marine mammals should be reduced to "insignificant levels that are approaching a zero mortality and serious injury rate." [16 USC 1371 (a)(2)]. This has become widely known as the zero mortality rate goal or ZMRG. Our organizations contend that the MMPA, through its commitment to the zero mortality rate goal, reflects the will of the American public, as it provides a commitment to avoiding the unnecessary death or injury of marine mammals.

In the case of interactions with marine mammals, the MMPA strives toward the goal of reducing marine mammal mortalities to levels that are biologically insignificant. While some organizations hold that the ZMRG is not meant to attain an "absolute zero" for marine mammal deaths, both CSI and WDCCS firmly believe that the ZMRG should be taken to mean the implementation of a precautionary approach to marine mammal management - and that in taking action to protect marine mammal populations that any loss of, or potential harm to, such animals should be avoided. Any human-caused marine mammal mortality is undesirable and we believe that the ideal objective of any fisheries management plan should be to eliminate such loss.

Although the concept of the ZMRG has been a part of the Marine Mammal Protection Act since it was first enacted in 1972, in the Federal Register notice it is claimed that "there has been no clear or consistent guidance on how much

mortality and serious injury amounts to insignificant levels." However, the notice goes on to say that "NMFS continues to use a value of 10 percent of a stock's PBR as a criterion in the stock assessment reports to evaluate whether incidental mortality is at insignificant levels approaching a zero mortality and serious injury rate...". WDCCS/CSI note that this concept also has been used as a reference point by the Take Reduction Teams (TRTs) in determining potential conservation and management actions.

Regarding the NOAA Fisheries proposal describing the three quantitative options for insignificant levels of mortality and serious injury for population stocks of marine mammals, we wish to note that we are opposed to Option 2 (a 10% delay in recovery to OSP) as a definition of ZMRG. Both the Whale and Dolphin Conservation Society and the Cetacean Society International are of the view that Option 1 provides the most precautionary of the three proposed approaches to marine mammal conservation.

In our view, Option 2 would fall far short of the mandate of the MMPA which clearly states that, "The immediate goal of the take reduction plan for a strategic stock shall be to *reduce, within six months of its implementation, the incidental mortality or serious injury of marine mammals incidentally taken in the course of commercial fishing operations to levels less than the potential biological removal level established for that stock under section 117.*" [16 U.S.C. 1387(f)(2)] We see that under Option 2, the ZMRG for threatened and endangered species could be set at the same level as PBR. Thus, no improvement to levels less than the PBR can be achieved, and endangered species would be afforded less protection than under Option 1.

Under Option 3, NOAA Fisheries contends in the Federal register notice that this option would be consistent with the Eastern Tropical Pacific (ETP) dolphin standard, "which is an 'insignificant metric specifically defined by Congress'. Our organizations maintain that the current ETP dolphin standard actually goes beyond the attainment of an insignificance threshold (T_{ins}). The International Dolphin Conservation Program Agreement, as enshrined in Pub. L. 105-42 sec. 6 (b)(1), calls for the participating nations taking yellow fin tuna in the ETP to reduce dolphin mortality progressively to a level approaching zero through the setting of annual limits, ***with the goal of eliminating dolphin mortality in that fishery.*** Further, in section 6(c), it is clear that the intent of Congress was to go beyond the dolphin mortality limits and levels established, as it called for "furthering the objectives set"; we hold that this indicates that an eventual elimination of dolphin mortality is envisaged.

NOAA Fisheries offers two potential approaches for evaluating a fisheries ability to meet ZMRG based on available technology and economic feasibility. We would argue that the first option, in which available technology and economic

feasibility would not be considered in evaluating a fishery's success in achieving ZMRG is the approach most reflective of both Congressional intent under the MMPA, and with legal interpretation.

Our organizations wish to point out that the primary purpose of the Marine Mammal Protection Act is to protect marine mammals. In *Kanoa Inc. v. Clinton, United States of America*, 1 F. Supp. 2d 1088 (1998) this was made quite clear. The court stated that, "the Act was not intended as a 'balancing Act' between the interests of the fishing industry and the animals... The interest of the marine mammals come first under the statutory scheme, and the interests of the industry, as important as they are, must be served **only after the protection of the animals is assured**". Additionally, this argument can be found in *Committee for Humane Legislation v. Richardson United States of America* 414 F. Supp. 297 (1976): "The Primary Purpose of the MMPA is to Protect Marine Mammals; the Act was not Intended as a 'Balancing Act' Between the Interests of the Fishing Industry and the Animals. Plaintiffs allege, and the Court agrees, that the defendants have failed to meet specific requirements of the MMPA with respect to the issuance of regulations and permits providing for the incidental taking of marine mammals."

Once again, we make reference to the 1997 amendment of the MMPA establishing the International Dolphin Conservation Program. The IDCP not only established an overall dolphin mortality limit, it also set (as of 2001) stock-specific dolphin mortality limits that were to be less than .1% of N_{min} (the minimum estimate of abundance). These limits were put into place, and became binding, irrespective of the current state of technological development. If the fishery failed to meet these limits, then fishing on the affected stocks was to cease. WDCCS and CSI, therefore, contend that Congress -- in the enactment of the IDCPA -- distanced itself from a definition of ZMRG that was solely equated with technological advances. Congressional intent was rather that the establishment of quantifiable mortality limits that approaching biologically "insignificant levels" were to be viewed as both a mechanism and an incentive to encourage commercial fisheries to further reduce marine mammal mortality in order to move toward an ultimate goal of eliminating mortality.

The history of marine mammal/fisheries interactions in the United States is replete with examples whereby, when incidental mortality and serious injury in a commercial fishery was greater than PBR, the fishing industry claimed that the existing technology would not allow further reductions of incidental mortality and serious injury in an economically feasible manner. ZMRG (and, once applied, the insignificance threshold) should serve as a mechanism that fosters the development of technologies or gear modifications that will allow further reduction in mortality. The fisheries industry has proven to be extremely creative in the face of such challenges, and will likely develop such methods or gears in both a cost-effective and timely manner.

Under NOAA Fisheries second option, WDCCS/CSI would argue that there is no incentive for future development of technologies to continue to reduce incidental mortality and serious injury to insignificant levels approaching zero. A fishery with incidental mortality above T_{ins} could merely state that new technologies were beyond the economic means of the fishery, thus avoiding management measures. Clearly such an easy "out" is not the intent envisaged by Congress, nor is it reflective of the will of the American public.

At the heart of the ZMRG process is the significant problem of lack of adequate data on which to base stock assessments. There is often no way of knowing how many animals there are in a given population, nor are we able to accurately determine the impact of mortalities in many of the fisheries that may interact with marine mammals. Because of a lack of resources, there are a number of fisheries about which we know little. Due to this, the Take Reduction Teams have often found it difficult to adequately and accurately assess the success or failure of their proposed management regimes.

If PBR levels are overestimated, and mortalities underestimated, because of inadequate monitoring then a marine mammal stock is exposed to excessive levels of risk from anthropogenic mortality. It is imperative that NOAA Fisheries examine both the assessment and compliance concerns that have been raised in the context of the TRT process. Monitoring, control, surveillance and enforcement are at the heart of any successful fisheries management program, and work to the benefit of both the conservation community and the fishing industry by ensuring that management decisions are made based upon the best available scientific advice. We believe that this is consistent with the findings in *Kokechik Fishermen's Association v. Secretary of Commerce* [839 F at 2d, 795, 1988], which clearly indicate that take permits could not be issued for marine mammals until such time that the population of each species was adequately determined.

While we acknowledge that marine mammal mortality in some fisheries has been reduced (in many cases, substantially), the Whale and Dolphin Conservation Society and the Cetacean Society International believe that a zero mortality rate can be achieved in ways that do not impose costly or burdensome demands on the fishing industry. We view the ZMRG as a valuable management tool that can be used to help calculate concrete limits that can then ensure methods of both determining the impact of anthropogenic activities on marine mammal stocks, and as a means of regulatory enforcement.

WDCS and CSI look forward to working further with NOAA Fisheries in the development of a ZMRG that will seek to mitigate and ultimately to eliminate marine mammal mortalities. Thank you for your consideration of our comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Kate O'Connell", written in a cursive style.

Kate O'Connell
Whale and Dolphin Conservation Society-US

On behalf of Cetacean Society International